Hospital Dr. Susoni, Inc. ***and*** **Unidad Laboral de Enfermeras(os) y Empleados de la Salud**. Cases 24–CA–8204 and 24–CA–8524

May 15, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On December 27, 2001, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel and Charging Party each filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Robert J. Debonis, Marisol Ramos Fernandez, and *Miguel Nieves Mojica, Esqs.*, for the General Counsel.

Tristan Reyes-Gilestra and *Pedro Manzano Yates, Esqs. (Fiddler, Gonzalez & Rodriguez)* of San Juan, Puerto Rico, for Respondent.

Harold E. Hopkins Jr., Esq., for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on October 16–19, 2001. The charge, and the amended, second amended, and third amended charges in Case 24–CA–8204 were filed January 27, March 10, April 14, and June 30, 1999,[1] respectively; the charge in Case 24–CA–8524 was filed on January 7, 2000. An order consolidating cases, third amended complaint and notice of hearing (the complaint) was issued June 29, 2001. At the hearing major sections of the complaint were settled by an informal settlement agreement signed by all parties.[2] The remaining portions in the complaint allege that Hospital Dr. Susoni, Inc. (Respondent) violated Section 8(a)(1) of the Act by maintaining photographs of employees engaged in union activity and violated Section 8(a)(3) and (1) by terminating employees Jose Santiago and Maritza Ramos. Respondent filed a timely answer that admitted the allegations in the complaint concerning jurisdiction, interstate commerce, labor organization status, and agency status of named individuals; it denied the substantive allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates an acute care hospital in Arecibo, Puerto Rico, where it annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000 directly from points located outside the Commonwealth of Puerto Rico. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unidad de Efermeras(os) y Empleados de la Salud (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As indicated, Respondent operates an acute care hospital. Julia Velez was the hospital administrator and Migdalia Ortiz Mestre was human resources director at the times relevant in this proceeding. Two elections were held among Respondent's employees in January. Although the record is not clear, it appears that one unit involved service and maintenance and technical employees. The election for this unit was held on January 15 and the Union lost. The Union filed objections to the election and a hearing was held on the objections at some time not specified in the record. The second election was held on January 20 for a unit of registered nurses. The Union apparently won that election.

B. Santiago's Discharge and a Related 8(a)(1) Allegation

Jose Santiago Batista worked for Respondent as a registered nurse since about 1988. Santiago distributed authorization cards and literature for the Union to fellow employees in the parking areas and at the main entrance to Respondent's facility. He did this for about half an hour both before and after his shift during the period of time between October 1998, until his termination. Almost all employees and supervisors used the entrance to the hospital at which Santiago distributed the union literature. In or about November 1998, Migdalia Ortiz, Respondent's director of human resources,[3] asked Santiago to come to her office; there she told him that she knew that unions were not prohibited but employees were not to hand out literature during working hours.[4] Santiago also held union meetings in his home and attended union meetings at the homes of other

[1] The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have examined the record and find no basis for reversing the findings.

[1] All dates are in 1999, unless otherwise indicated.

[2] The settled case numbers have been deleted from the caption of this case.

[3] Santiago described this person as Migdalia "Rios," chief of human resources. From context I conclude that he was referring to Migdalia Ortiz.

[4] The General Counsel does not allege that this conversation is unlawful.

employees, including alleged discriminatee Maritza Ramos. These meetings occurred in late 1998 and early 1999.

As indicated above, the complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining photographs of employees engaged in union activity. In support of this allegation Santiago testified that on the day of the election, after he voted, he met Union Representative Jose Castillo in front of the front entrance to Respondent's facility. While speaking to Castillo about the election, Santiago noticed someone standing above on the bridge of the hospital with a camera about 35–40 feet from them. Santiago and Castillo then both waved their hands to the person with the camera. The General Counsel and the Union did not call Castillo to corroborate Santiago's testimony, nor did they explain their failure to do so. Santiago testified that about 3 days later he had to go to the office of Julia Velez, Respondent's hospital administrator. Velez was not present on that occasion and while waiting for her Santiago saw in Velez' office a tripod with an easel. Santiago testified that on the easel he saw seven to eight photographs of different employees, including one of Maritza Ramos. That photo showed Ramos handing out authorization cards to employees. Some of the other employees that Santiago recognized were among those active in the Union's organizing drive; others he was unable to state whether or not they were involved in the campaign. He saw a photo of an employee handing out union literature; he also saw a photograph of himself and Castillo waving as they had done 3 days earlier after the election.

Velez, who was no longer employed by Respondent at the time of the hearing, did not testify. Migdalia Ortiz Mestre was director of human resources; at the time of the hearing she was no longer working for Respondent. She testified that she visited Velez' office on an almost daily basis while she was still working for Respondent. She further testified that it is not possible to see into Velez' office from the area outside the office. Ortiz also testified that she never saw any bulletin board in Velez' office.

In resolving this allegation of the complaint, I first credit Ortiz' testimony that one cannot see into Velez' office from the waiting area outside. Her testimony in this regard was detailed and convincing and although it was capable of being challenged by other evidence, it was unrebutted. It follows from this finding that Santiago must have been in Velez' office, or at least not in the waiting area, in order to see into the office. Yet Santiago did not explain how he came to be in or near the office of the hospital administrator instead of waiting for her in the waiting area. It strikes me as unlikely that Velez would have photographs of employees engaged in union activity displayed in her office and yet allowed employees to have access to her office. I also note that the General Counsel did not attempt to corroborate Santiago's testimony either by calling Castillo as a witness or by subpoenaing the photographs.[5] Moreover, as explained below, I have determined that Santiago's testimony was not credible in other respects. Under these circumstances I am unable to credit Santiago's testimony concerning this allegation of the complaint. I have taken into account the fact that Velez did not deny Santiago's testimony. However, Velez was no longer employed by Respondent at the time of the hearing, and thus no adverse inference can be made concerning her failure to appear. In any event the burden remains on the General Counsel to present credible evidence to support the allegation. I conclude that he has failed to do so and I will dismiss this allegation of the complaint.

I return now to the events that lead to Santiago's discharge. Respondent contends that it fired Santiago because he did not renew his professional license. Respondent's rules require nurses, among others, to maintain their professional licenses in order to continue to be employed in that profession. Puerto Rico law requires that registered nurses renew their licenses every 3 years by taking courses totaling a certain number of credit hours. Respondent's policy allows employees to first use accumulated vacation time to take the courses and renew their license. If the employee has still failed to renew the license after using vacation time, Respondent will place the employee on leave without pay for a period of time to give the employee another chance to obtain the license.

Respondent advised Santiago several times in 1998 that he had to renew his license again. From November 2 to 27, 1998, Respondent granted Santiago's request for vacation so that he could take the courses necessary to obtain his license. On December 3, 1998, Respondent notified Santiago in writing that he still had not renewed his license, that his regular vacation time had been exhausted, and that he would be placed on leave without pay from November 30 to December 29, 1998, in order to complete the necessary courses. On February 24, Respondent notified Santiago in writing that his license was about to expire and that he had not yet obtained a renewal. The written notice warned that Santiago would be terminated if he failed to do so.

Nonetheless, Santiago's license expired on February 28; he lacked 10–12 credit hours. He claimed that he had already taken the courses necessary to obtain those credit hours but a hurricane caused computer problems that resulted in the late transmission of this information.[6] Yet Santiago testified that he took the necessary courses during his two periods of leave. Santiago testified that he decided to take additional courses just in case the certificates from the earlier courses did not arrive. He testified that he told his supervisors, including Ortiz, that the certificates were about to arrive, that they were late, and that he had enrolled in other courses in case he had to take them if the other certificates failed to arrive on time. He claimed that he was told that the fact that he had enrolled in classes did not guarantee that he was going to take them. Ortiz testified that in March she asked Santiago why he had not renewed his license. Santiago said that it was due to neglect on his part. He explained to Ortiz that he had a part-time job distributing newspapers and that did not allow him time to take the needed courses and that he made $14 per hour at that job, which was more than he made working for Respondent. According to

[5] In his brief the General Counsel faults Respondent for failing to call Velez' secretary as a witness. However, the General Counsel has failed to show that the secretary is an agent rather than an employee of Respondent. Thus, no adverse inference is proper.

[6] The parties stipulated that Hurricane Georges hit the island of Puerto Rico on September 18, 1998.

Ortiz, Santiago said that he was applying for a "heavy" driver's license and that would allow him to earn more money. Santiago said that he was planning to take some courses and that he had some agreement with another supervisor. Ortiz told him that the policy was that he would be dismissed if he did not have his license renewed. Santiago also told Ortiz that he had planned to take some courses but that they were cancelled because of the hurricane. He showed Ortiz a program of courses to be given in the future but gave no indication that he had registered for them.

Respondent's counsel asked Santiago whether he was working elsewhere at the same time he was working for Respondent in late 1998 and early 1999. He answered, "no". Respondent's counsel then asked whether he was involved in the distribution of a newspaper in Arecibo. Santiago again answered, "no", explaining that he did 1 week's work but it was suspended because he had to work 11 p.m. to 7 a.m. shifts. Santiago then testified that he worked for the newspaper before his termination and for about 6 months afterwards. Santiago then admitted that he worked for the newspaper from June to December 1998, and also from January to March. He explained that the newspaper, a weekly publication, would call him when one of its regular distributors did not show up for work. Santiago would then distribute the newspapers to businesses on a designated route. This process could take a day or two. When asked how doing this work affected his ability to take the courses needed to renew his license, Santiago testified that it did not affect him because he already had taken the courses and was waiting for the certificates. He denied that he was planning to obtain a "heavy" drivers license. However, he admitted that he told Ortiz that he was working for the newspaper and that if he worked fulltime for the newspaper he would be making good money.

On March 2, Ortiz sent Santiago a memorandum that indicated that they had met on March 1 and discussed the expiration of his license. The memorandum advised Santiago that effective March 3 he was terminated because he had failed to renew his license. After his termination, the Union submitted copies of courses that he had taken, but no license was submitted. Santiago testified that about a month and a half after he was fired, the certificates arrived and his license was renewed, but he admitted that he did not submit the documents necessary for the renewal to Respondent until June 22. After he was fired, Santiago took the three courses needed to renew his license. He explained that after he was fired he had a lot of time on his hands. He also explained that the courses could be used for his next renewal. The General Counsel presented no documentary evidence to support any of Santiago's testimony on this matter, particularly evidence that the certificates from the earlier courses finally arrived and based thereon his license was renewed.

I now address the matter of credibility raised by the conflicting testimony set forth above. I credit Ortiz' version of the pretermination conversation over Santiago's. First, Santiago was not fully forthcoming about the details of his conversation with Ortiz; rather, important details had to be pried from him on cross-examination. He also initially denied having worked extensively on another job and only admitted that fact when Respondent's counsel revealed that he knew of Santiago's work for the newspaper. Also, Santiago's testimony does not withstand scrutiny. For example, he testified that he completed his course work before he began working for the newspaper, yet he also admitted that he worked for the newspaper as early as June 1998. In light of the stipulation that the hurricane struck on September 18, 1998, there is no explanation as to what accounted for the delay in transmitting the certificates prior to the time of the hurricane for the courses he allegedly took prior to June. I also do not credit Santiago's explanation concerning why he was unable to renew his license. Importantly, the General Counsel failed to produce any documentary evidence to support Santiago's testimony that he had in fact taken all the necessary courses in time to obtain the certificates and renew his license. Moreover, Santiago's testimony that the hurricane delayed the transmission of the certificates rings hollow, especially in the absence of corroborating testimony from the course givers that this was the case. When Santiago finally admitted that he had been working for the newspapers, the inherent probabilities based on the record as a whole point to the likelihood that his outside work was the reason he failed to renew his license. Significantly, there is no evidence that at the time he was granted vacation time and leave without pay that he told his supervisors that he had already taken the courses and thus did not need the time off. Under all these circumstances, and also based on my observation of the relative demeanor of the witnesses, I do not credit Santiago's testimony set forth above.

The General Counsel recognizes that Santiago could not continue to work as a nurse after his license had expired. However, the General Counsel contends that Respondent should have allowed Santiago to work in other positions that did not require a license. In support of this contention, Santiago testified that other employees who were unable to renew their licenses on time were allowed to work in other areas of the hospital that did not require a license; this allowed them to continue to work while they attempted to renew their license. He specifically mentioned Iris Toledo, Marilyn Maldonado, Madeline De La Rosa, Zulma Rios, and Daisy Sanchez. Santiago also testified that near the end of February he told Toledo, the supervisor in the emergency room, that he had heard of a vacant position in quality control in the records room. He said that he was interested in that position. Toledo replied that she had no knowledge of the position but that she would find out whether it was available. Toledo never got back to Santiago on the matter. However, the General Counsel has failed to show that there were any vacancies at the time Santiago's license expired.[7]

Ortiz gave the names of many other employees that have been terminated because they failed to renew their professional licenses. She testified that Respondent does not have a policy

[7] In his brief the General Counsel contends that the unrebutted testimony shows that there was an open position. However, it is the General Counsel's burden to present reliable and credible evidence to prove the existence of the vacancy. Santiago's testimony that he told a supervisor that he had heard that a vacancy existed is at least double hearsay. Moreover, the General Counsel failed to establish a foundation for Santiago's knowledge. I conclude this testimony falls far short of showing the existence of a vacancy.

of automatically transferring such employees to positions that did not require licenses. She explained that De La Rosa was unable to pass the exam to obtain her license. However, there was an opening in a position that did not require a license and she asked to be placed there and she was. Ortiz explained that Sanchez was a registered nurse who asked to be transferred to the position of coordinator of pre-admissions when that vacancy occurred. Thereafter her license expired, but her new position did not require one. She, in any event, renewed her license. Ortiz testified that she did not know a Zulma Rios, but did know Zulma Gonzalez and Lourdes Rios. Gonzalez failed to pass her exam and was terminated. Rios also failed to pass her exam, but there was an opening in a position that did not require a license and she took that position. Ortiz testified that Teresa Maldonado had failed to present her license and Respondent followed its policy and placed her on vacation. During vacation she was able to obtain the license and thus was allowed to continue to work.

I once again credit Ortiz' testimony over that of Santiago. Her testimony was more detailed, her demeanor was confident, and she was in a position to have more knowledge of the facts.

The shifting burden analysis set forth in *Wright Line*[8] governs the determination of whether Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against Santiago. The Board has restated that analysis as follows:

> Under *Wright Line*, the General Counsel must make a *prima facie* showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7/] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8/] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9/]

[7/] NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983).

[8/] See *GSX Corp. v. NLRB*, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the Illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

[9/] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

Applying this framework, I have concluded above that Santiago engaged in extensive union activity. I also conclude that Respondent was aware of this activity. I base this conclusion not only on the discussion that Santiago had with Ortiz about the Union, but also on the open and public nature of Santiago's union activities in front of Respondent's facility. The General Counsel has thereby established the elements of union activity and knowledge by the employer of that activity. However, I have not credited the testimony offered by the General Counsel to show that Respondent had antiunion animus. Nor can I conclude that the reason asserted by Respondent for Santiago's discharge was a pretext to disguise an unlawful reason. To the contrary, I conclude that Santiago was terminated because he failed to renew his professional license. While Respondent had a policy of allowing employees who failed to renew their licenses to transfer into other positions, this policy applied only when there were openings available; here the General Counsel failed to show that any such opening existed at the time that Santiago's license lapsed. Under these circumstances, I conclude that the General Counsel has failed to meet his burden under *Wright Line* and I shall dismiss this allegation of the complaint.[9]

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

C. Ramos' Discharge

Maritza Ramos Aquino worked as a registered nurse in the hospital OBG maternity ward from September 1994 until her termination on June 21, 1999. Ramos assisted the Union in its organizing campaign by attending meetings, one of which was held at her home. She also distributed union literature during her break and lunch times near the front entrance to the hospital. Ramos was an observer for the Union at the election on January 20, and appeared at the election site on January 15 to be available to serve as an observer for the Union at that election too. However, because she was not a member of that unit she was not selected. Ramos also appeared at the hearing held on the union's objections to the first election, but her testimony was not required. Respondent's supervisors saw Ramos there.

On July 4, Ramos worked the 11 p.m. to 7 a.m. shift in the delivery room. She arrived, as she normally did, about 15 minutes prior to the start of the shift so that she could count the narcotics. After Ramos counted the narcotics, the nurse on the earlier shift, Sandra Cardona, gave Ramos an update on the number and condition of the patients in the area. One of the patients who had not yet been admitted was a woman who was diagnosed as being 38 weeks pregnant, with asthma, fever, and fetal tachycardia. The patient had been examined and admitted by Dr. Edwin Candelario, who made the diagnosis. Among other things, he concluded that because the fetus had tachycardia[10] a fetal monitor[11] should be placed on the patient. Al-

[9] In his brief the General Counsel argues that Ortiz' testimony shows that Respondent had a policy of that required it to suspend Santiago for 10 days before he was fired. I am not at all sure that Ortiz' testimony must be read in such a fashion. It appears to deal with normal progressive disciplinary matters. Importantly, there is no evidence that the other employees who were fired for failure to renew their licenses were first suspended for 10 days.

[10] Tachycardia is a medical condition of having an accelerated heart rate. The normal fetal heart rate is between 120 and 160 beats per minute. Fetal tachycardia is a heart rate of more that 160 heartbeats per minute sustained for over 10 minutes. Among the causes of fetal tachycardia is maternal fever. Fetal tachycardia is not a disease; it is an indication that other things may be occurring to the fetus. However, fetal tachycardia may progress to the point that insufficient oxygen gets

though the patient was not in labor Dr. Candelario admitted her to the delivery room. At the time Ramos began working, the patient already had a fetal monitor on her. According to Ramos' notes, the fetal monitor indicated that the fetal heart rate was between 160 and 170 beats per minute. At about 1:50 a.m., Ramos removed the fetal monitor. At that time, the records showed that the fetal heart rate was 180 beats per minute and the patient was showing regular contractions every 3 minutes. This was an indication that the patient might be going into labor. There is a dispute concerning what the protocol is for removing the fetal monitor. Ramos testified that the normal practice is to remove the monitor after 30 minutes unless the doctor has ordered that it stay there for a longer period of time. Dr. Candelario testified that if a patient has fetal tachycardia the rule is that the fetal monitor remains in place until the doctor orders its removal. He explained that the fetal monitor is removed after 30 minutes only when a patient is being administered a nonstress test, a circumstance not present for the patient in question. Dr. Candelario was present when Ramos began working. In the written orders left by Dr. Candelario there was no indication as to how long the fetal monitor was to remain on the patient. Dr. Jose Rodriguez Gomez was president of the board of directors for about 3–4 years. He was medical director for about 10–15 years and director of obstetrics and gynecology for over 25 years. He occupied the latter position from 1974 until 1999 or 2000 when he was dismissed from that position. He was also removed from his position as medical director at some point prior to July 1, 1996. While he was director of obstetrics and gynecology, he was responsible, along with other doctors, for setting the proper protocol to be used in the department. At the time of the hearing he was an attending physician at the hospital and occupied no supervisory position with Respondent.[12] Dr. Rodriguez testified that the proper protocol concerning the use of fetal monitors was that for nonstress tests, the fetal monitor remains in place for one-half hour or whatever specific time the doctor orders, and then is removed. If a doctor is using the fetal monitor throughout labor then the doctor must specify that the fetal monitor is to remain in place. He testified that such an order either had to be in writing or, if by telephone, the order would be entered on the patient's records and signed by the doctor within 12–24 hours thereafter. Dr. Rodriguez explained that verbal orders can be given to nurses, who then should write the verbal order on the patient's records. However, those circumstances should be limited to instances where the doctor is unavailable to make written orders. The doctor should later confirm the verbal order by placing his signature next to order. Practical nurse Sandra Nunez worked with Ramos on July 4. She testified that the protocol is for the fetal monitor to be removed from a patient not in active labor after one-half hour unless there are doctor's orders to the contrary. I conclude, based on the testimony of Ramos, Nunez, and Dr. Rodriguez, that the protocol existing in the hospital permitted nurses to remove the fetal monitor after one-half hour unless ordered otherwise by the doctor. I conclude that Dr. Candelario's testimony to the contrary was not supported by a sufficient foundation to show that it was, in fact, the policy at the hospital as opposed to what Dr. Candelario believed the policy should be.

There is also a dispute concerning whether Dr. Candelario issued verbal orders to Ramos concerning the fetal monitor. Dr. Candelario testified that he instructed the nurse on the earlier shift to place the fetal monitor on the patient, but that he did not rely on the nurse to present the patient to the nurses on the next shift. He testified that he directly told Ramos that the patient had acute asthma and fetal tachycardia and that he wanted the fetal monitor to remain in place. Ramos testified that he said nothing to her that morning. Nunez was present before the start of the shift with Ramos and Dr. Candelario; she did not see Dr. Candelario talk to Ramos that day before he left. I conclude that Dr. Candelario did not personally give any verbal orders to Ramos on July 4. I base this conclusion not only on my observation of the relative demeanor of the witnesses, but also on the fact that Ramos' testimony was corroborated to a degree by Nunez. I also consider it unlikely that Dr. Candelario would issue a verbal order that the fetal monitor remain in place until otherwise ordered when his written orders contained no such instruction.

Ramos also had the patient transferred out of the delivery room. She testified that her outstanding instructions were that patients with contagious conditions but who are not in active labor should not be admitted to the delivery room for fear that the contagious conditions could be spread to other patients. She included patients with a fever in that group. Ramos testified that she explained the condition of the patient to Carmen Alicia Gutierrez Llanos, the supervisory nurse, and that Gutierrez then instructed that the patient should be moved to another room.[13] Gutierrez told Ramos the room to which the patient should be moved. Dr. Rodriguez also testified that a pregnant patient with a fever who is not in active labor should be removed from the delivery to avoid infections of other patients. Nunez physically transferred the patient to the other location. She testified that patients with a fever are not kept in the delivery room because that was a sterile area. She also testified that Gutierrez instructed Ramos to transfer the patient out of the delivery room. Dr. Candelario, however, explained that he admitted the patient to the delivery room because the patient would be under a higher level of monitoring there than in other areas of the hospital. He further testified that the patient's fever was likely caused by dehydration and therefore there was no concern for harm to other patients in the delivery room. He testified that if the nurse felt that the patient had an infectious disease the nurse should have contacted him. He

to the brain of the fetus. This in turn may cause brain damage and learning disabilities that become apparent as the baby matures.

[11] The fetal monitor is designed to measure the vital signs of a fetus, particularly the heartbeat. It emits tracings that maybe read by the doctor or nurse.

[12] He also owned one share of Respondent's stock.

[13] Gutierrez, on the other hand, testified that Ramos did not tell her that the patient had a fetal monitor in place and that if Ramos had done so she would not have approved the transfer. However, Gutierrez admitted that she observed the fetal monitor on the patient earlier when she assisted implanting an intravenous device on the patient. I conclude that Gutierrez' testimony in this regard is an after-the-fact excuse that it not credible.

described the errors attributed to Ramos as placing the patient and fetus at risk. I conclude, based on the testimony of Ramos, Dr. Rodriguez, and Nunez that the practice at the hospital was to have patients with a fever removed from the delivery room for fear that they might harm other patients there. Dr. Candelario's testimony that the patient was not contagious was based on a medical diagnosis that he did not share with Ramos. Nor is there any indication in his written orders that the patient should remain in the delivery room notwithstanding her fever.

Dr. Candelario explained that he left the hospital on July 4 because after he checked the fetal monitor he felt that the fetal heart rate was within the acceptable range of variability and there were signs of fetal wellbeing. He concluded that the patient and fetus were in stable condition. Between 5:30 a.m. and 6 a.m. the next day, Dr. Candelario called the hospital and discovered that the patient had been transferred out of the delivery room to the surgery ward and that the fetal monitor had been removed. He then called the delivery room and spoke to a nurse; that nurse then handed the telephone to Ramos, saying that Dr. Candelario wanted a report concerning what happened to the patient. After some expressions of anger as to why the patient had been transferred, Dr. Candelario told Ramos that they were going to make a report on the incident. Dr. Candelario ordered that the fetal monitor again be placed on the patient and he immediately returned to the hospital. There he examined the patient, and determined that the patient was about to go into labor. He performed an emergency Caesarian section on the patient. The patient and baby were released from the hospital on July 8 in good condition.

Thereafter Dr. Candelario did prepare a report. In that report Dr. Candelario stated that on July 4 he personally presented the patient to Ramos and emphasized to her that the reason the patient was in the delivery room was because of fetal tachycardia. He described how he later called the hospital to inquire as to the condition of the patient and discovered that the patient had been transferred out of the delivery room because the patient had a fever and that may have posed a risk to other patients in the area. He also learned that the fetal monitor had been removed. In the report Dr. Candelario explained that the patient's presence in the delivery room did not pose a risk to other patients because once treatment began the patient's temperature lowered into the normal range. Dr. Candelario stated:

> Mrs. Ramos' action constitutes an unnecessary risk with a real potential medical legal case, since any type of defect in the development of this baby until he/she is 21 years old may be related to this incident.

On July 9, Marili Diaz Gonzalez, associate director of nursing, sent a memorandum to Doris Aponte, Esq., director of institutional programs. Diaz described how Ramos told her that she had transferred the patient from the delivery room and that Dr. Candelario was upset by that action. Ramos had explained to her that she made the decision to transfer the patient because the patient was not in labor and had a fever. Diaz noted that her review of the patient's medical file supported Ramos' comments. Diaz noted that she spoke with Dr. Candelario, who expressed his concern that the transfer created an unnecessary risk for the patient and the baby. Diaz also noted that she spoke with another nurse on the shift, who confirmed that she knew of the transfer and that she sent a licensed practical nurse to take the patient out of the delivery room. Finally, Diaz indicated that she spoke with the nurse in charge of the surgery room, where the patient had been transferred.

Respondent did not contact Ramos about the incident until the day she was terminated on July 21. On that day, Ramos was summoned to the office of Marili Diaz. She was accompanied by another employee who also had been an active union supporter. Ramos testified that Diaz told her that she wanted to go over the incident of July 4. As they were reviewing the matter, Diaz received a call from Ortiz. Diaz told Ortiz that she did not think that the matter was as easy as she thought it was. Diaz then told Ramos to go to Ortiz' office. Ramos testified that once there, Ortiz made a general reference to the incident, began to cry, and told Ramos that they did not need her services. Ortiz testified that she participated in the decision to discharge Ramos, and that Ramos was terminated because her conduct at the hospital put patients' lives at risk. Ortiz interviewed Marili Diaz, Doris Aponte, and Julia Velez. She evaluated reports that had been made concerning the matter and reviewed Ramos' personnel file. She considered the reports made by Marili Diaz, Dr. Candelario, and others. Ortiz testified that she met with Ramos and her union representative on the day that Ramos was terminated. Ortiz told Ramos that the hospital had done an extensive analysis of what had occurred concerning the July 4 incident and that the hospital could not allow such a situation to occur because it caused risks for the patients. She asked Ramos whether she had received instructions from anyone to transfer the patient and Ramos answered that she had not, that she had done the transfer because the patient had a high fever. Ramos was told that she was terminated.[14] Ortiz testified that she did not recall anyone crying at the meeting. To the extent that there is a conflict between the testimony of Ramos and Ortiz concerning the content of the discharge conversation, I credit Ortiz. Her testimony was more detailed and her demeanor more confident. She did not strike me as someone who would cry while performing her duties.

By way of background, sometime prior to the events of July 4, the hospital experienced a fetal death that occurred after a fetal monitor was removed from a patient.

The General Counsel presented the testimony of Dr. Rodriguez to establish antiunion animus by Respondent. Dr. Rodriguez testified concerning comments made during board of directors' meetings concerning the Union and about remarks he

[14] Ramos testified that *after* the July 4 incident she and the nursing staff received training with respect to use of the fetal monitor. The training was under the supervision of Supervisors Maribel Mendez and Marili Diaz. After the close of the hearing Respondent filed a motion requesting permission to submit document into evidence. The General Counsel filed an opposition and Respondent filed a reply to the General Counsel's opposition. Those documents shall be received into evidence as ALJ Exhs. 1–3, respectively. Respondent seeks permission to introduce in evidence documents it says will show that Ramos received the training on use of fetal monitors *before* the July 4 incident. I deny Respondent's motion. This evidence was available prior to the close of the hearing and Respondent has failed to show good cause for its failure to offer this evidence during the hearing.

made to Ramos about the Union. As to the latter, those remarks are not alleged to be unlawful. Dr. Rodriguez gave this testimony is summary fashion, being unable to recall with much precision what was actually said. In essence, he testified that Ramos was concerned that she would suffer reprisals for engaging in union activity, that he advised her to be sure to do her job well, and that she should not engage in union activity inside the hospital. When asked if he recalled if anything else that was said Dr. Rodriguez answered "that's all." However, after being shown a prior statement he then testified that he recalled making other remarks to Ramos. Although I have credited Dr. Rodriguez' testimony in other respects, I am not persuaded that his testimony on this matter is sufficiently reliable to be credited. Dr. Rodriguez was unable to give a very precise time for these conversations and he appeared to testify more about impressions than fact. I also take into account that Dr. Rodriguez had been involuntarily removed from his positions of director of obstetrics and gynecology and medical director and was also involved as a plaintiff in a lawsuit against Respondent. Dr. Rodriguez testified that the comments to Ramos were made while he was still the medical director, yet the more credible testimony of the current medical director established that Dr. Rodriguez has not served in that position or attended any board of directors meeting since July 1, 1996. Lastly, his demeanor as a witness concerning this testimony was not convincing. Under these circumstances I do not credit his testimony concerning these conversations.

I again apply the *Wright Line* analysis to determine whether Ramos' discharge violated the Act. I have set forth above how Ramos was openly involved in supporting the Union. It is also clear that Respondent was aware that Ramos was an active union supporter from her participation in the election process as a union observer and by her appearance as a witness for the Union at the postelection hearing. These factors support the General Counsel's case. However, I have not credited any of the evidence that the General Counsel relies on to show that Respondent harbored antiunion animus. This seriously weakens his case. Nor does the timing of the discharge contribute to the General Counsel's case.

I turn now to examine whether the reasons asserted for Ramos' discharge were a pretext from which I can infer an unlawful motive. Respondent asserts that Ramos was terminated because she removed the fetal monitor from the patient on July 4 and then had the patient transferred out of the delivery room.[15] However, I have concluded that the procedure was for the fetal monitor to be removed after one-half hour unless a doctor orders that it should remain in place for a longer period of time. I have further concluded that Dr. Candelario did not give any instructions, either verbally or in writing, that the monitor should remain in place for a longer period of time. I have also concluded that Respondent's practice was to remove patients who had a fever from the delivery room if they were not in active labor and that Dr. Candelario never made it clear to Ramos that he wanted the patient to remain in the delivery room notwithstanding her fever. So the facts show that Ramos was acting in accordance with existing procedures yet she was fired for doing so. However, that conclusion alone does not necessarily compel a finding that the Ramos' discharge was motivated by antiunion animus. The entire case must be examined in determining whether such an inference can be made. Here, there appears to be other reasons why Respondent might have terminated Ramos notwithstanding her apparent compliance with hospital policies. Under the facts of this case I decline to infer that Ramos' union activities were a motive in her discharge. I note particularly the absence of any credible evidence of antiunion animus. I conclude that the General Counsel has failed to establish his initial burden under *Wright Line*. I shall dismiss this allegation of the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The complaint is dismissed.

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[15] In its brief Respondent argues that even if Dr. Candelario did not give Ramos instructions that the fetal monitor should remain in place Ramos should have known, based on the sustained fetal heart rate, to seek medical authorization before removing the monitor. I reject this contention because it was not given as a reason for Ramos' discharge at the time it occurred or at any time prior to the hearing.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.